

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs October 26, 2006 Session

**GARY WALLACE v.  
TENNESSEE DEPARTMENT OF CORRECTIONS, ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 05C-1615     Thomas Brothers, Judge**

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**No. M2005-01916-COA-R3-CV - Filed on November 8, 2006**

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Gary Wallace ("Plaintiff") is an inmate at the Whiteville Correctional Facility. Plaintiff was sent a package through the U.S. mail which contained illegal drugs. Although the package was intercepted before being delivered to Plaintiff, Plaintiff was disciplined for conspiring to bring illegal drugs into a penal facility. Plaintiff appealed the disciplinary action through the appropriate channels within the Department of Corrections. The disciplinary action taken against Plaintiff was affirmed throughout this process. Plaintiff then filed a petition for common law writ of certiorari claiming the actions of the Department of Corrections and its representatives were illegal, fraudulent, and arbitrary. The Trial Court entered an order giving Plaintiff twenty days in which to make a partial payment toward the filing fee, in accordance with Tenn. Code Ann. § 41-21-807. When Plaintiff failed to make the partial payment as ordered, the Trial Court dismissed the petition in its entirety. Plaintiff appeals, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Gary Wallace, *pro se* Appellant.

## OPINION

### Background

Plaintiff currently is confined at a correctional facility in Whiteville, Tennessee. Sometime in early 2005, the prison mail facility received a package addressed to Plaintiff. The package contained seven (7) rocks of crack cocaine, two (2) hydrocodones, and .52 ounces of marijuana. The package was intercepted before delivery to Plaintiff. Plaintiff was charged with conspiracy to introduce contraband into a secure penal facility in violation of Tenn. Code Ann. § 39-16-201.<sup>1</sup> Following a hearing before the disciplinary board, Plaintiff was found in violation of the statute and sentenced to 15 days punitive segregation and fined \$5.00 for committing a Class A infraction. Plaintiff appealed through the prison's administrative procedures, but was afforded no relief.

On June 1, 2005, Plaintiff filed a petition for common law writ of certiorari in the Davidson County Circuit Court. Plaintiff sued the Tennessee Department of Corrections and various individuals affiliated with that Department who were involved in the disciplinary process.<sup>2</sup> In short, Plaintiff claimed in the petition that the disciplinary board acted illegally, fraudulently, and/or arbitrarily. There were several documents filed contemporaneously with the petition, including an affidavit of indigency as well as an affidavit as required by Tenn. Code Ann. § 41-21-805. In addition, Plaintiff filed a certificate by the custodian of inmate accounts which stated that as of May 19<sup>th</sup>, Plaintiff had a total of \$1.05 in his trust account and that the average balance in Plaintiff's trust account during the previous six months was \$19.48. Plaintiff paid nothing toward the filing fee when the petition for writ of certiorari was filed.

On June 13, 2005, the Trial Court entered an order finding that Plaintiff had failed "to file the partial payment of the filing fee as required by T.C.A. 41-21-807. The total Filing Fee is \$42.50." The Trial Court's order informed Plaintiff that he had twenty (20) days to comply with the statutory requirement and make a partial payment toward the filing fee or his case would be dismissed. Plaintiff then filed a motion to amend the petition for certiorari and attached a second certificate from the custodian of inmate accounts. The second certificate was dated June 20, 2005, and stated that Plaintiff had a balance of 24¢ in his trust account, and the "average monthly deposits to his prison trust fund account for the past six (6) month period ... [was] \$25.71." Plaintiff still paid nothing toward the filing fee, and the Trial Court entered an order on July 25<sup>th</sup> dismissing the

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<sup>1</sup> Tenn. Code Ann. § 39-16-201 makes it a Class C felony for a person to "[k]nowingly and with unlawful intent take, send or otherwise cause to be taken into any penal institution where prisoners are quartered or under custodial supervision any weapons, ammunition, explosives, intoxicants, legend drugs, or any controlled substances found in chapter 17, part 4 of this title."

<sup>2</sup> The Trial Court dismissed this action before the petition was served on the Tennessee Department of Corrections or any of the other defendants. The defendants were not aware this lawsuit had been filed until this case was on appeal. Because the defendants never were served or participated in the proceedings before the Trial Court, they opted not to file any briefs in this appeal.

petition because Plaintiff “[f]ailed to file the partial payment of the filing fee as required by T.C.A. 41-21-807.”

Plaintiff appeals claiming the Trial Court erred when it dismissed the petition based on his failure to make a partial payment toward the filing fee as required by Tenn. Code Ann. § 41-21-807.

### **Discussion**

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In relevant part, Tenn. Code Ann. § 41-21-807 provides as follows:

**41-21-807. Accounting of inmate funds required as part of civil action – Payment of fees – Frivolous or malicious claims. – (a)**

An inmate seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit required by § 41-21-805, shall submit a certified copy of the trust fund account statement, or institutional equivalent, for the inmate for the six-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each facility at which the inmate is or was confined.

(b)(1) If an inmate brings a civil action or files an appeal in forma pauperis, the inmate shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of twenty percent (20%) of the greater of the average monthly:

(A) Deposits to the inmate's account; or

(B) Balance in the inmate's account for the six-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the inmate shall be required to make monthly payments of twenty percent (20%) of the preceding month's income credited to the inmate's account. The agency having custody of the inmate shall forward payments from the inmate's account to the clerk of the court each time the amount in the account exceeds ten dollars (\$10.00) until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall an inmate be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the inmate has no assets and no means by which to pay the initial partial filing fee....

Tenn. Code Ann. § 41-21-807 (2003).

When Plaintiff filed the petition for writ of certiorari on June 1, 2005, Plaintiff should have paid at least \$5.15, which equals 20% of the average of the monthly deposits into his trust account for the previous six month period. As noted previously, on May 19<sup>th</sup>, Plaintiff had \$1.05 in his trust account. However, deposits were made into Plaintiff's trust account and on the day before the petition was filed, Plaintiff had \$45.05 in his account. On the very day the petition was filed, Plaintiff made three withdrawals from his trust account totaling \$44.88, leaving only 17¢. While we do not know how Plaintiff used the \$44.88, we do know that none of it was sent to the Trial Court for partial payment of the filing fee. We also note that a deposit was made to Plaintiff's trust account on June 14<sup>th</sup> in the amount of \$34.68, but Plaintiff still did not make the required partial payment. In short, funds were available for Plaintiff to make a partial payment as required by law. Funds continued to come available to Plaintiff even after the Trial Court entered its order requiring Plaintiff to make the necessary payment.

Since Plaintiff had sufficient funds available in his trust account to make the minimum required partial payment and he failed to pay those funds to the court, we find no error in the Trial Court's judgment dismissing the petition. See *Freeman v. Department of Probation and Parole*, No. M2002-00958-COA-R3-CV, 2003 WL 1798080 (Tenn. Ct. App. Apr. 7, 2003), *no appl. perm. appeal filed*, wherein we affirmed the dismissal of the plaintiff's petition for writ of certiorari when the plaintiff failed to make a partial payment toward the filing fee. We stated:

Mr. Freeman had \$23.55 in his prison trust fund account on the day before he filed his petition in this case. The average balance in his account for the six immediately preceding months was \$24.85. Accordingly, while Mr. Freeman could not have paid the full filing

fee when he filed his petition, he had sufficient funds to make the partial payment required by Tenn. Code Ann. § 41-21-807(b)(1). Mr. Freeman's trust fund account records also reflect a deposit and balance history that would have enabled him to make the partial payment required by Tenn. Code Ann. § 41-21-807(b)(1) anytime before the trial court eventually dismissed his petition on April 4, 2002.

Mr. Freeman failed to comply with the trial court's November 21, 2001 order in a timely manner and failed to present either to the trial court or this court any justification for his failure to do so. He is, therefore, the author of his own misfortune.... We affirm the judgment dismissing Mr. Freeman's petition for failure to comply with Tenn.Code Ann. § 41-21-807.

*Freeman v. Department of Probation and Parole*, 2003 WL 1798080, at \*\*2, 3 (footnote omitted).

When confronted with similar facts in *Parra-Soto v. Newble*, No. M2003-00090-COA-R3-CV, 2003 WL 22794519 (Tenn. Ct. App. Nov. 25, 2003), *perm. app. denied Apr. 5, 2004*, we stated:

The record of the present case shows that Mr. Parra-Soto was notified of the requirement of payment and the consequences for failure to comply. Nonetheless, he failed to make any payment. His trust fund account statement indicates he had the money to pay the filing fee or make a partial payment. He has failed to present any justification for his failure to comply with Tenn. Code Ann. § 41-21-807. Consequently, his petition was properly dismissed.

*Parra-Soto v. Newble*, 2003 WL 22794519, at \* 2.

As in *Freeman* and *Parra-Soto*, Plaintiff has failed to offer any explanation as to why he refused to use available funds to pay the statutorily required partial payment within the time period in which he was ordered to do so by the Trial Court. The judgment of the Trial Court is, therefore, affirmed.

### **Conclusion**

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Gary Wallace.

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D. MICHAEL SWINEY, JUDGE